UNITED NATIONS

AT

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 828

Case No. 916: SHAMAPANDE

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, President; Mr. Mikuin Leliel Balanda, Vice-President; Mr. Julio Barboza;

Whereas, at the request of Yorbert K. Shamapande, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, successively extended the time-limit for the filing of an application with the Tribunal until 31 January, 29 April, 31 July and 31 October 1994 and 31 January 1995;

Whereas, on 31 January 1995, the Applicant filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, at the request of the Applicant, the President of the Tribunal successively extended the time-limit for the filing of a corrected application with the Tribunal until 30 September and 31 December 1995 and 30 June 1996;

Whereas, on 22 March 1996, the Applicant filed an application containing pleas requesting the Tribunal, inter alia:

> "(9) ... to hold, pursuant to its earlier decision in Judgement No. 447, Abbas and pursuant to [the] Staff Regulations, in particular regulation 4.2, that 'the fullest regard' was not given by the Respondent to the Applicant's

qualifications in filling Vacancy announcement No. 91-E-DGD-074-NY, in DESD [Department for Economic and Social Development], ...

...

(11) ... to declare that ... the sum of $65,000.00, as requested by the Applicant, constitutes a much more reasonable award of compensation [than the $3,000.00 awarded by the JAB] in the circumstances.

(12) ... to hold that DESD violated relevant provisions of the United Nations Charter and Staff Rules and Regulations, in particular Article 101 of the Charter with respect to 'Paramount Consideration' and staff regulation 4.4 dealing with 'Fullest Regard' being given to qualifications and experience in filling of vacancies within the United Nations.

(13) ... [to recognize] the solemn obligations of the Secretary-General of the United Nations under the Charter of the United Nations, in particular Article 101, [and the] Staff Regulations, in particular regulations 4.2 and 4.4 and staff rule 104.14(a)(ii).

(14) ... to rescind the administrative decision of selecting a candidate with inferior qualifications which were not exclusively in the economic field as called for by the vacancy announcement.

(15) ... to direct the Secretary-General of the United Nations to ratify the Applicant's contractual and procedural rights [that were] violated by promoting him against the contested D1 post in DESD or placing him against another suitable post at [the] D1 level within the Organization, effective 25 June 1992, the date on which he was provisionally short-listed for a D1 post in DESD.

(16) ... to direct the Secretary-General of the United Nations to pay to the Applicant the initial compensation assessed by the JAB in the amount of three thousand United States dollars (US$3,000) for injuries sustained by the Applicant."

Whereas the Respondent filed his answer on 21 June 1996;

Whereas, on 16 July 1997, the Tribunal put questions to the Respondent, to which he provided answers on 21 July 1997;

Whereas the facts in the case are as follows:

The Applicant entered the service of the Organization on 1 January 1980, as an Economic Affairs Officer in the Office of the Commissioner for Namibia (OCN), on a fixed-term appointment, at the P-3, step I level. His appointment was successively extended for the duration of his assignment to OCN. He was promoted to the P-4 level on 1 April 1982, and to the P-5 level, with the title of Senior Economic Affairs Officer, on 1 October 1987. With effect from 1 January 1992, he was transferred to the Department of Public Information (DPI) and his functional title changed to Senior Information Officer. On 1 April 1992, his appointment became permanent.

On 5 February 1992, the Applicant submitted his application for the D-1 post of Principal Economic Affairs Officer in the Office of the Director-General for Development and International Economic Co-operation, as advertised in Vacancy Announcement #91-E-DGD-074-NY. Under the vacancy management procedures then in effect, the applications were evaluated by both DESD and the Office of Human Resources Management (OHRM) and then sent to the Appointment and Promotion Board (APB), which short-listed the Applicant and three other internal candidates.

On 30 June 1992, the Recruitment and Placement Officer, Professional Staffing Service, OHRM, wrote to the Applicant, informing him that he had been put on the provisional short list for the post. On 10 July 1992, the Applicant availed himself of the opportunity to submit additional information with regard to his candidacy. On 7 August 1992, the APB forwarded a final short list of five candidates, including the Applicant, to DESD.

On 2 October 1992, the Acting Deputy Executive Officer, DESD, informed the Director, Recruitment and Placement Division, OHRM, that DESD had selected another candidate for the D-1 post. On

7 October 1992, the Recruitment and Placement Officer, OHRM, informed DESD that OHRM had approved the selection. She also informed the Applicant.

In a letter dated 6 November 1992, to the Secretary-General, the Applicant requested an administrative review of that decision. Having received no reply, the Applicant, on 4 January 1993, lodged an appeal with the Joint Appeals Board (JAB), requesting a suspension of action, under the terms of staff rule 111.2(c).

The JAB adopted its report on 29 January 1993. Its considerations and conclusions read as follows:

> "Considerations
>
> 14. The Panel determined that there were two necessary conditions to be met for a recommendation to be made for a suspension of action:
>
> (a) the administrative decision in question had not already been implemented; and
>
> (b) [that] the administrative decision is, in fact, the subject of the appeal.
>
> The first condition had not been met. The action in question, the selection of the candidate, had been completed. The selection decision was implemented by 12 October 1992 when a P-5 form was issued assigning the chosen candidate to the post. Therefore, the Panel is unable to recommend that the act of selection be stayed."

On 3 February 1993, the Director of Personnel transmitted to the Applicant a copy of the JAB report and informed him as follows:

> "The Secretary-General has examined your request in the light of the Board's report. He has noted that the Board made no recommendation in its support since the action in question had already been implemented. Accordingly, the Secretary-General has decided that your request cannot be accepted."

On 23 June 1993, the JAB adopted its report on the merits of the Applicant's appeal. Its considerations and recommendation read, in part, as follows:

"Considerations

12. ... the Panel reviewed the material before it to determine (a) whether there was evidence of prejudice or other extraneous factors in that process, and (b) whether there were any procedural flaws which might have affected Appellant's rights. With respect to (a), the Panel concluded that Appellant had failed to produce any evidence of prejudice or other extraneous factors.

13. ... The Panel was convinced - with one reservation - that the procedures had been fully respected up through the APB decision establishing the final short-list. That reservation concerned the job description of the contested post. The Panel regretted Respondent's failure to provide it, despite its repeated requests, with a copy of the completed and approved job description, thus depriving it of the opportunity to confirm factual information supplied by Respondent. Where the Panel was able to cross-check documents, it discovered two factual errors in Respondent's submissions. The first is in the first sentence of paragraph 7 of the Respondent's reply (...); the second in para. 1(e) of [the Representative of the Secretary-General]'s memorandum. These errors may well be inconsequential, but they do serve to illustrate that mistakes are made. The Panel could not independently confirm that there were no mistakes at that early stage in the process.

14. It is precisely at the final stage of consideration to which Appellant addresses his allegations that the Panel found a procedural flaw. It had only assertions - by the Acting Deputy Executive Officer, DESD, and by Respondent - that the qualifications of all the candidates were carefully reviewed in DESD. To paraphrase UNAT Judgement #447: Nothing was known about how the final selection was made, how the candidates' worth was assessed and who assessed [the candidates] and with what result. Guided by the Tribunal's observations, the Panel requested Respondent to submit internal DESD material which might elucidate the process of consideration. No material was submitted, nor was any explanation or description of the assessment process.

15. As in the matter of the job description, the Panel was disturbed by Respondent's failure to respond. That failure was susceptible of two interpretations:

(a) The facts necessary to establish Respondent's full respect for Appellant's procedural rights do not exist, or

(b) Respondent did not see fit to make them available to the Panel.

In any event, the burden of proof is on Respondent, and Respondent did not provide that proof to the Panel. Following the reasoning of UNAT Judgement No. 447, the Panel need not conclude that Appellant would have automatically been selected for the post in order to conclude, as it does, that he had been denied due process.

Recommendation

16. The Panel recommends that Appellant be paid compensation for the injury suffered in the amount of three thousand dollars ($3,000.-)

17. The Panel makes no further recommendation with respect to this appeal."

On 16 July 1993, the Applicant was advised by the Under-Secretary-General for Administration and Management of the Secretary-General's decision on the JAB's recommendation:

"The Secretary-General has carefully reviewed the recommendation of the JAB as contained in paragraph 16 of its report to pay you the sum of $3,000 as compensation for injury suffered. The Secretary-General does not agree to this payment. He is convinced that no injury has been suffered by you and your rights under the Staff Rules and Regulations were not violated, to warrant payment of [an] indemnity.

It is also noted in paragraph 12 of the report, the Board's conclusion that no evidence had been produced to show prejudice or other extraneous factors in the selection process.

It is noted further that the Appointment and Promotion Board has considered your candidature which resulted in including you in a final short-list of five candidates, which was submitted to the then Department of Economic and Social Development (DESD) for final selection. DESD selection was approved by OHRM in accordance with the system of promotion prevailing at that time.

The Secretary-General, therefore, does not feel that there was any injury sustained by you or by any of the other candidates who were, like yourself, short listed by the Appointment and Promotion Board.

For the above reasons, the Secretary-General rejects the above recommendation of the JAB."

On 22 March 1996, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Administration did not give full and fair consideration to his qualifications in filling the D-1 post in DESD, which constitutes a violation of the Charter and the relevant Staff Rules and Regulations.

2. The decision to select another, less qualified, candidate for the post in question was motivated by prejudice against the Applicant or other extraneous factors and denied the Applicant due process.

Whereas the Respondent's principal contentions are:

1. Selection and appointment is within the discretion of the Secretary-General. A staff member does not have a right to promotion, but only a right to consideration for promotion.

2. The decision not to select the Applicant was not motivated by prejudice or other extraneous factors.

3. The Applicant's procedural rights were fully respected and there was no violation of due process.

The Tribunal, having deliberated from 16 July to 1 August 1997, now pronounces the following judgement:

I. The Applicant was a staff member at the P-5 level, who applied to fill the D-1 vacancy of Principal Economic Affairs Officer. According to the job description, the post required a specialization in economics, particularly focused on "African economic recovery and development, ... with a view to advising the Director-General and the ASG [Assistant Secretary-General] in an authoritative manner." Under the vacancy management procedures then in effect, the applications for the post were reviewed by the Department for Economic and Social Development (DESD) and the Office of Human Resources Management (OHRM), before being sent to the Appointment and Promotion Board (APB), which short-listed the Applicant and three other candidates. DESD's final decision was in favour of another candidate from that list.

II. The Tribunal notes that neither the Applicant nor the Joint Appeals Board (JAB) finds any flaw, procedural or otherwise, up to the moment when the APB forwarded a final short list of five candidates, including the Applicant, to DESD, on 7 August 1992. The Applicant's appeal focuses on the procedure by which DESD selected the successful candidate for the post.

III. The Applicant argues that the successful candidate's qualifications and experience were not exclusively in the field of economics, as required by the vacancy announcement and, to the extent that the chosen candidate had economic training and experience, they were demonstrably inferior to the Applicant's. Based on what he perceives as a disparity between the successful

candidate's level of qualifications and his own, the Applicant alleges that the selection process was unfair and inequitable.

IV. The Respondent contends that the Applicant has no right to be selected for any particular post, since the power of selection is within the discretion of the Secretary-General. He asserts that the Applicant's procedural rights were fully observed and that the Applicant has produced no evidence of prejudice or extraneous factors which would vitiate the Secretary-General's decision to choose another candidate for the post. The Tribunal notes that evidence of prejudice or extraneous factors must be provided by the Applicant. The Tribunal agrees with the JAB that, in the present case, the Applicant has not provided such evidence.

V. The Tribunal also recalls that the discretion of the Secretary-General to select the candidate that he considers the most suitable for the vacant post is also subject to the provisions of staff rule 4.2 and Article 101 of the Charter. The latter provides that "[t]he paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence and integrity."

VI. The Tribunal has held repeatedly that, in order to effect the foregoing purpose, it is indispensable that "full and fair consideration" should be given to all applicants for a post. The Respondent bears the burden of proof with respect to this issue. In Judgement No 362, Williamson (1986), the Tribunal held that:

> "... since the staff member has a statutory right to have 'the fullest regard' given to his candidature, the burden of establishing the Administration's failure to consider that candidacy does not fall upon him. If once called seriously into question, the Administration must be able to make at

> least a minimal showing that the staff member's statutory right was honoured in good faith in that the Administration gave its 'fullest regard' to it."

The Tribunal's jurisprudence emphasizes that it is not the Tribunal's role to substitute its judgement for that of the Secretary-General, but merely to ascertain whether the Secretary-General's duty to give each candidate full and fair consideration has been reasonably fulfiled. In Judgement No. 447, Abbas (1989), the Tribunal further specified that "reasonable" and "measurable" were the standards applicable in such cases: "... such consideration should to some measurable degree meet the criterion of 'fullest regard' in a reasonable manner."

VII. The Tribunal recalls that the JAB requested the Respondent "to submit internal DESD material which might elucidate the process of consideration". The JAB noted that "it [the JAB] had only assertions - by the Acting Deputy Executive Officer, DESD ... - that the qualifications of all the candidates were carefully reviewed in DESD." In order to ascertain whether the Respondent had in fact given the Applicant requisite consideration for the post, the Tribunal requested the Respondent to provide a description of "how DESD 'carefully reviewed the qualifications and seniority of the candidates'" and ultimately selected the successful candidate. The Tribunal further requested the Respondent to provide it with "any relevant documents, such as minutes of meetings, internal communications, notes and any other pertinent material." In reply, the Respondent advised the Tribunal that "the Department has no additional documents on this case beyond those that have already been provided to the JAB and form part of the JAB file. We have also been advised by [the Executive Officer, DDSMS] that the Department has no other statement to make in respect of its assessment of the qualifications and seniority of the candidates for

the post in question, beyond what has been indicated in the memorandum of 10 December, 1992 from [the Executive Officer, DDSMS] to [the] Chief Administrative Review Unit, concerning this case."

VIII. The Tribunal considers that the memorandum of 10 December 1992 has considerable bearing on the case. This memorandum states that the Applicant had been given full and fair evaluation among the 16 candidates for the post, three of whom met all the requirements. It then goes on: "The substantive evaluation of [the Applicant] reads as follows: 'The strength of the [Applicant] is professional experience in his involvement in African economic issues, in particular in directing, coordinating and administering multidisciplinary economic programmes for Namibia and Southern Africa countries. The [Applicant] also has strong multidisciplinary experience and skills in dealing with high level Government officials and delegations. The [Applicant]'s knowledge of system-wide coordination, global, economic issues and policies is satisfactory though [sic] exposure to adoption; review and implementation of UNPAAERD [UN Programme of Action for African Economic Recovery and Development] and Medium-Term Programme for Africa is missing.' Although [the Applicant] met all the requirements of the post, the selected candidate, ..., had an edge over him in programming procedures and in implementation of UNPAAERD, besides the fact that he was already working in the Africa Economic and Recovery Development." (Emphasis in original)

IX. The Tribunal presumes that this document, which was addressed to the Representative of the Secretary-General before the JAB, at her request, should have been made available to the JAB. If it was not available to the JAB, it should have been, for it is the Respondent's duty to transmit all pertinent evidence in his

possession to the JAB. The Tribunal, however, did not receive this document until it put a question to the Respondent.

X. The Tribunal notes that the JAB, in its report, made a statement that the Respondent had not provided "any explanation or description of the assessment process." The Tribunal finds, however, that the memorandum of 10 December 1992 provides at least a "minimal showing" that the Respondent gave the Applicant "full and fair consideration" for the post in question. This memorandum demonstrates that the Respondent reviewed the Applicant's abilities and his curriculum vitae and that he was deficient in an area that the selected candidate was not. Further, the memorandum sets forth the criteria on the basis of which the successful candidate was selected.

XI. The Tribunal cannot, and will not, substitute its judgement for that of the Secretary-General. Further, it is not for the Tribunal to establish whether the criteria for the selection of a candidate should have been different. However, the Tribunal believes that in the future, the recommendation of the JAB mentioned in Judgement No. 447, Abbas should be followed in all cases of selection for vacant posts in the Administration: "... the Joint Appeals Board recommended ... 'that future selection procedures of D-2 appointments include written records on the evaluation of candidates'." The Tribunal considers that more complete records of the deliberations of the selection bodies would improve provide better evidence of a "minimal showing" that consideration has been given to a candidate for a post.

XII. For the foregoing reasons, the application is rejected in its entirety.

(Signatures)

Hubert THIERRY
President

Mikuin Leliel BALANDA
Vice-President

Julio BARBOZA
Member

Geneva, 1 August 1997

R. Maria VICIEN-MILBURN
Executive Secretary